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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 74-520

ERNEST L. MONTANYE, former Superintendent of Attica Correctional Facility, and HAROLD SMITH, former Deputy Superintendent of Attica Correctional Facility,

Petitioners,

v.

RODNEY R. HAYMES,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent, Rodney R. Haymes, who is now held in the Green Haven Correctional Facility, Stormville, New York, asks leave to file the attached Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

In lieu of respondent's affidavit, counsel's affidavit is attached hereto.

HERMAN SCHWARTZ
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SUNYAB North Campus
Amherst, New York 14260
(716) 636-2091

Counsel for Respondent

DATED: Amherst, New York
November 26, 1974

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AFFIDAVIT

HERMAN SCHWARTZ, being duly sworn, deposes and says:

1. I am counsel for Respondent Rodney R. Haymes in the above-entitled matter, and I submit this affidavit in lieu of his affidavit in support of his motion for leave to proceed in forma pauperis.

2. On November 21, 1974, I sent copies of a proposed affidavit of indigency to respondent Haymes at Green Haven Correctional Facility in Stormville, New York, where he is presently incarcerated. I asked that Mr. Haymes sign and notarize the affidavit, if theinformation contained therein was true and satisfactory to him.

3. On December 4, 1974, respondent's brief in the above-entitled matter is due in the Supreme Court.

4. As of today, November 26, 1974, your deponent has not received the affidavit from respondent Haymes, although it is expected soon. Since the office of counsel will be closed and counsel will be out of town from November 27th through December 1st, it is unlikely that your deponent will be able to receive and file respondent's affidavit of indigency prior to filing of respondent's brief.

WHEREFORE, your deponent requests that respondent be allowed to file only one copy (rather than 40 copies) of his brief on the assumption that respondent's affidavit of indigency will be filed within a week of the filing of the brief and that in forma pauperis treatment will be granted.

HERMAN SCHWARTZ

Sworn to before me this
26th day of November, 1974

AUDREY KOSCIELNIAK
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1976

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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RODNEY R. HAYMES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent Rodney R. Haymes, an inmate of the New York State prison system, hereby opposes the petition for a writ of certiorari filed by petitioners Ernest Montanye and Harold Smith to review a decision of the United States Court of Appeals for the Second Circuit in the case of United States of America ex rel. Rodney R. Haymes v. Montanye, which was decided on October 4, 1974. The decision reversed an order of the United States District Court for the Western District of New York, dated June 4, 1973, dismissing the complaint in a civil rights action brought pursuant to 42 U.S.C. §1983, 28 U.S.C. §1343. Although the case was captioned as a habeas corpus proceeding in the lower courts, it has been treated throughout as a civil rights action.

QUESTION PRESENTED

Should this Court review the question of whether a prisoner is entitled to due process if he is punitively transferred from one maximum-security prison to another, when the court below merely reversed dismissal of a pro se complaint and remanded the case for findings as to whether the transfer was indeed punitive and did produce sufficiently adverse consequences?

Statement of the Case

Respondent accepts petitioners' statement of the facts and prior proceedings herein as essentially correct, except for the assertion that "Haymes was not disciplined in connection with the incident" (P. 5).* Such a characterization begs the question ultimately raised by Haymes and which is the subject of the remand--was the transfer intended to discipline him?

ARGUMENT

The Court of Appeals decided very little: it merely ruled that where a prisoner asserts he has been punitively transferred--an assertion that respondent supported with specific factual allegations--a dismissal of his pro se complaint was not consistent with the liberal pleading rules of Haines v. Kerner, 404 U.S. 519, 520 (1972), without findings of (1) whether the transfer had in fact been imposed for punitive reasons, and (2) whether the prisoner suffered significantly adverse consequences. The court thereupon reinstated respondent's pro se complaint and remanded the case for trial to determine those two issues. There is thus no final judgment for this Court to consider, and review is inappropriate. Hamilton-Brown Shoe Co. v. Wolf Bro. & Co., 240 U.S. 251, 257-58 (1916); Bro. of Locomotive Firemen & Engineers v. Bangor & Aroostook R. R. Co., 389 U.S. 327 (1967); Cobbledick v. United States, 309 U.S. 323 (1940).

On such a record--which consists of nothing more than a few allegations in a pro se complaint and two affidavits in opposition filed by petitioners--it is difficult to see how the Court can use this case to adequately "resolve the transfer issue at the earliest possible date" (P. 11). In contrast with the comprehensive factual record made after days of testimony in Preiser v. Newkirk, No. 74-107, here we know so few of the essential facts that this Court would be deciding an abstract question in a factual vacuum, contrary to its long-standing policy and practice. See White Motor Co. v. United States, 372 U.S. 253 (1963).

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*References to the petition will be cited as ("P. ___"); references to the appendix to the petition will be cited as ("A. ___").

I

THE COURT OF APPEALS MERELY GAVE RESPONDENT AN OPPORTUNITY TO SHOW HE WAS TRANSFERRED FOR PUNITIVE REASONS.

It is apparently undisputed between the parties that a transfer for the sole purpose of "disciplinary punishment in response to an act of misconduct" must be attended by "notice of the gravamen of the misconduct and an opportunity to be heard in relation thereto." The State of New York conceded as much--in exactly these words--in Newkirk v. Butler, 499 F.2d 1214, 1217 n. 4 (2d Cir. 1974), cert. granted sub nom. Preiser v. Newkirk, 43 U.S.L.W. 3223, No. 74-107 (October 21, 1974). Since it is clear that serious punishment may not be imposed without procedural due process, Wolff v. McDonnell, ___ U.S. ___, 42 U.S.L.W. 5190 (June 24, 1974), and usually is so attended in New York (A. 7a-9a), "it would be anomalous indeed," as Chief Judge Kaufman wrote,

> "both from a due process and an equal protection point of view, if the prison authorities could accomplish by transfer a procedure-free punishment which they could not accomplish within their own walls.' Gomes v. Travisono, 490 F.2d 1209, 1215 (1st Cir. 1973)." (A. 9a)

With respect to this issue, the Court of Appeals thus made no new law, but merely adopted a principle that petitioners apparently accept. All that that court did, was to remand for a finding as to whether the transfer was in fact punitive. The respondent had contended and supported his contention with factual allegations; petitioners themselves cited his rule violations in their affidavit responding to his complaint, and he was in fact transferred two days after the alleged violation.*

Indeed, petitioners' position on this first issue is not altogether clear. They nowhere disagree with the proposition that a transfer for disciplinary punishment requires due process, nor could they, consistent with their statement in Preiser v. Newkirk, quoted above. They try to evade the problem semantically, however, by labelling the transfer as being "without the imposition of disciplinary punishment" (P. 4, 5, 11).

This approach either begs the question of whether the transfer was intended as disciplinary punishment for a rule violation, or it defines

---

*Petitioners' own Statement of the Facts indicates the punitive nature of the transfer (P. 4-5).

the issue out of existence by simply denying that a transfer without a formal disciplinary charge and hearing is "the imposition of disciplinary punishment."

Petitioners also suggest that the Court of Appeals guidelines are "vague and unworkable" (P. 11). Without attempting to set out a definitive standard--which would obviously be inappropriate on such a sparse record--Chief Judge Kaufman noted that "when harsh treatment is meted out to reprimand, deter or reform an individual . . . one [is being] punished." (P. 7a) This hardly seems "vague and unworkable." Furthermore, the case was remanded to determine the reasons for the treatment, which would help to refine the standard.

Nor does the decision or opinion allow a prisoner to obtain a full federal court hearing whenever he chooses to label a transfer "punitive." Respondent alleged facts to support that conclusion, and petitioners themselves pointed to a particular rule violation as the basis for their actions. The Court of Appeals also noted that:

> "the papers reveal that less than forty-eight hours after Haymes was ordered to cease collecting signatures without permission in the recreation yard, he was shipped to the Clinton Correctional Facility hundreds of miles away." (A. 5a-6a)*

Most significantly, whether these criteria for what is "punitive" are "vague and unworkable," can only be determined after facts and evidence are developed with respect to the issue.

Disciplinary transfers for punitive purposes are a standard sanction within the prison disciplinary context. The Federal Bureau of Prisons provides for such transfers as the most severe of disciplinary sanctions, Policy Statement: Inmate Discipline, No. 7400.5C, ¶9(d)(6),

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*Petitioners' claim that the Court of Appeals' decision in this case conflicts with its earlier decision in Newkirk (P. 11-12) misconstrues both Newkirk and the decision below. Newkirk held only that a transfer could not escape due process requirements simply by being classified "administrative," if it produced a grievous loss. It did not hold or even intimate that punitive transfers could be inflicted without due process. Indeed, in language directly applicable to this case, the Court of Appeals wrote, "it would be something of a paradox if prison authorities could by transferring a prisoner for disciplinary reasons to another institution (within or without the state) deprive him of due process rights to which he would be entitled upon a transfer within the prison itself." 499 F.2d at 1218.

In any event, an intracircuit conflict can be and should be resolved by a rehearing en banc.

p. 13 (10-4-74),* as does the American Correctional Association Manual of Correctional Standards, p. 416 (1972).** When such a disciplinary transfer takes place, both parties agree that a prisoner is entitled to a fair hearing. All that the Court of Appeals did was to reverse a district court's denial of a prisoner's opportunity to show whether he was transferred for punitive purposes and with punitive effect.

II

THE RECORD IS BARREN AS TO WHAT RESPONDENT SUFFERED AS A RESULT OF THE TRANSFER AND THIS COURT IS IN NO POSITION TO DECIDE WHETHER A GRIEVOUS LOSS WAS INVOLVED IN THE TRANSFER.

This Court sits to decide important questions of law but only in the context of concrete fact situations, and not in a vacuum. Compare White Motor Co. v. United States, 372 U.S. at 263. (The Court must know "enough of the . . . stuff out of which" questioned practices emerge.) Here, there are virtually no facts upon which to decide whether and when a maximum-to-maximum intrastate transfer has consequences "sufficiently adverse to be characterized as punitive" (A. 10a).

---

*(d) Dispositions of the Institution Discipline Committee: The Institution Discipline Committee shall have available a broad range of sanctions and dispositions. These dispositions and sanctions will include the following:

. . . . . .

(6) Direct that an inmate be transferred to another institution for disciplinary reasons. Where a present or impending emergency requires immediate action, an inmate may be transferred prior to an Institution Discipline Committee hearing. However, a hearing before the Institution Discipline Committee at the receiving institution must be conducted as soon as practicable under the circumstances to consider the factual basis of the charge of misconduct and the reasons for the emergency transfer. Transfers for disciplinary reasons prior to a hearing before the Institution Discipline Committee are to be used only in emergency situations and only with the approval of the receiving Regional Director. However, when an inmate is transferred under these circumstances, the sending institution will forward copies of incident reports with completed investigation to the receiving institution for purposes of the hearing before the receiving institution's Institution Discipline Committee. All procedural requirements applicable to Institution Discipline Committee hearings contained in paragraph 9(c) of this policy statement will be utilized, except written statements of unavailable witnesses may be liberally accepted instead of live testimony."

**Quoted at A. 11a.

Petitioners' position on what constitutes the necessary grievous loss--which they say is "the legal issue at the heart of these cases" (P. 11)--is equivocal. At the close of their petition, they suggest somewhat tentatively that an inmate transferred like Haymes "may suffer fewer deprivations in a legal sense than" other transferees (P. 15) (emphasis added). This of course raises the possibility that inmates like Haymes "may" also suffer as much or more. Only a factually developed record like that in Newkirk, supra, or in Gomes v. Travisono, supra, can determine that question. Where, as here, there is no such record, it is difficult to know how this or any other Court can decide the question.

Earlier in the petition, however, petitioners seemed to argue that a prisoner who is transferred to an institution of the same security classification within the same state can never suffer serious loss (P. 14). Two paragraphs later, though, petitioners recognize that "an inmate may suffer some dislocation as a result of an intrastate transfer" at the same level but assert without any factual support that this cannot be enough "to invoke the Due Process Clause" (P. 14).

Each of these contentions is a clearly disputable and disputed factual question, which can only be determined after a trial of the facts. For example, where, as here, the transfer is for a serious violation of an important rule, an unanswered record notation of that event will label the prisoner a troublemaker in other institutions and often preclude him from good jobs, residence in an honor block, eligibility for certain training and other programs, opportunities for work release, furloughs, and the like.* Perhaps most important, such a record notation is likely to seriously reduce his chances for early release on parole.* The absence of a factual record on these questions precludes any assured judgment about these clearly grievous losses and thus precludes this Court from determining the possible consequences of a punitive transfer.

Second, the "program opportunities" may not be "essentially the same" (P. 14) at all maximum-security institutions within a state. In New York, they often have not been: Auburn Prison in New York had work-release long before Attica; Ossining had a computer training program which others did not. On this issue as well, the Court is in no position to decide whether Haymes suffered a substantial deprivation, without a factual record.

Finally, the dislocation could well involve many of the problems agreed by petitioners to result from an interstate transfer (P. 14), as Chief Judge Kaufman noted (A. 10a). These include, but are not limited to: segregation in special housing units for weeks after arrival in the receiving institution (see 7 NYCRR §304.4 on detention admissions for transferees with questionable behavior records); loss of records; loss of property; quite "serious problems of orientation" in a new invironment (P. 15); great distance from family, friends, and counsel; and much, much more. Again, without the

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*The loss of such benefits was alleged in Babchak v. Preiser, Civ. 74-265 (W.D.N.Y. 1974). In that case and months after the event, a New York State prison official described the reason for the transfer as follows:

> "It would appear to deponent that Mr. James F. Howser, Administrative Assistant, Program Services, was somewhat in error in regard to the plaintiff's transfer from Attica because of a suspected attempt to smuggle contraband into the facility, as this incident was just one of many alleged enterprises of a group of inmates in "E" Block, second floor, who had inordinate control and influence within the Attica Correctional Facility. This group consisted of the following inmates:
>
> JULIUS KLEIN T#25386, IIS #204299
> ENRICO GENTILE T#24004, IIS #422935
> SALVATORE NOTO T#27786, IIS #1025794
> RONALD F. BABCHAK T#23467, IIS #747352
> WAYNE TRIMMER T#23468, IIS #908534
> ROBERT POIRER T#27788, IIS #3278124
>
> "Such activities of this group centered around alleged involvement in performing degrading homosexual acts with a certain inmate who admitted some involvement to deponent; making homemade 'booze', (based on information and belief, four pails of homemade booze were found in one cell in 'E' Block, second floor, immediately following Inmate KLEIN's transfer) the alleged pilfering of 'pills' from the facility; the manipulation of certain Correction Officers by providing food, haircuts, favors to the extent that they could not effectively perform their duties; the manipulation of a Correction Counselor by one of the above named inmates to the extent that said inmate allegedly was selling furloughs in certain instances; deponent is in possession of two inmate statements to this effect; the alleged introduction by certain Correction Officers of contraband into and out of the facility." Affidavit in Opposition of Warren A. Harding, Assistant Inspector General, Department of Correctional Services of New York State (June 18, 1974).

This information obviously came from Babchak's file and is following him around. He first learned of it upon reading the affidavit in opposition, and denies the charges.

*Where early release on good time is affected by punitive action, due process is clearly required. McDonnell v. Wolff, supra. In New York, an in-prison committee called the Time Allowance Committee has the power to determine how much lost good time is restored to a prisoner after he serves two-thirds of his maximum, see 7 NYCRR §§260-61, N. Y. Corr. L. §803. Since a record notation of a punitive transfer and the reasons therefor can significantly affect the thinking of the Time Allowance Committee, the mere notation may be enough to reduce the ultimate good time allowance and inflict grievous loss. On remand, it can be ascertained whether Haymes has lost any good time and is therefore subject to the Time Allowance Committee's power to restore some or all of it.

kind of factual record developed in Newkirk, it is impossible to know whether or not "the consequences of . . . [Haymes' intrastate maximum-maximum transfer] are insufficient to be deemed a substantial deprivation in a legal sense or to invoke the Due Process Clause" (P. 14).*

III

THE GRANT OF CERTIORARI IN PREISER v. NEWKIRK DOES NOT JUSTIFY SIMILAR ACTION HERE.

Petitioners' primary argument for certiorari seems to be simply that since the Court is dealing with one transfer problem in Newkirk, it should deal with all transfer cases currently being offered to it (P. 15). And there may be a thought that since the Court has taken one transfer case, there is no harm in taking another one which seems to raise a somewhat different issue--intrastate transfers on the same custody level.

This reasoning is faulty. Newkirk v. Preiser, with its fully developed record and detailed legal analyses based on that record, was obviously an appropriate vehicle for deciding an important issue. This Court will note how often the Court of Appeals in Newkirk used portions of the record and findings to develop its legal analyses. See, e.g., 499 F.2d at 1217, 1218, 1219.

Here, by contrast, we have only a barebones, pro se complaint construed liberally under Haines v. Kerner, supra, and an affidavit in opposition from one of the petitioners. Nothing more. An issue as important

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*Petitioners' efforts to demonstrate great conflict in the cases seems unavailing. The four district court decisions cited on p. 9 of the petition hardly qualify as a conflict in circuits. The only Court of Appeals decision cited as possibly in conflict with the decision below with respect to intrastate transfers is Gray v. Creamer, 465 F.2d 179, 187 (3d Cir. 1972), but there is no indication that plaintiffs alleged there--as Haymes did here--that the transfers had resulted in substantial deprivations. The Third Circuit simply concluded that "based on the allegations of the complaint, we find no merit to this argument, since . . . a state prisoner has no constitutional right to remain in any prison."

With respect to interstate transfers, the only appellate decisions cited are Fajeriak v. McGinnis, 493 F.2d 468 (9th Cir. 1974), which explicitly noted that it was "unnecessary . . . to enunciate any broad procedural rule for general application in all cases involving nonconsensual transfer of a prisoner from one institution to another," 493 F.2d at 470 n. 3, and Hillen v. Director, 455 F.2d 570 (9th Cir. 1972), cert. denied, 409 U.S. 989 (1972), which was a one-sentence per curiam decision on a pro se appeal.

Moreover, whatever conflicts do exist can probably be decided by a decision in Newkirk.

as due process for punitive transfers from one maximum-security facility to another should not be decided on so thin a basis. Indeed, but for the fact that petitioners lost below, it is hard to believe that they would themselves consider this case an appropriate vehicle for determining these questions. We simply cannot know enough from the few papers filed herein to decide what fundamentally are complex factual issues.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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DATED: Amherst, New York
November 26, 1974

Certificate of Service

I hereby certify that on November 27, 1974, I mailed a copy of the within Brief in Opposition to Louis J. Lefkowitz, Attorney General, State of New York, Two World Trade Center, New York, N. Y. 10047.

Herman Schwartz
HERMAN SCHWARTZ